

UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

MONARCH GREENBACK L.L.C.,  
THE VIRGINIA BURROUGHS DAVISON )  
TRUST, THE BARBARA BURROUGHS )  
KNIPE TRUST, THE A.H. )  
BURROUGHS, III TRUST, AND THE )  
DOE RUN RESOURCES )  
CORPORATION )

Defendants.

CIVIL ACTION NO.: CV 02-436-S-EJL

**CONSENT DECREE**  
**WITH MONARCH GREENBACK, LLC**

**I. BACKGROUND**

A. The United States of America (United States), on behalf of the Administrator of the United States Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (CERCLA), seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Talache Mine Tailings Superfund Site near Atlanta, Idaho (the Site).

B. The defendant that has entered into this Consent Decree (Settling Defendant) does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

C. The United States has reviewed the financial information submitted by Settling Defendant to determine whether Settling Defendant is financially able to pay response costs incurred and to be incurred at the Site. Based upon this financial information, the United States has considered the overall financial condition of Settling Defendant and demonstrable constraints on the ability of the Settling Defendant to raise revenues and determined that Settling Defendant is able to pay the amounts specified in Sections V (Payment of Response Costs) and VI (Establishment of Escrow Account and Implementation of Post Removal Site Control Plan) and still maintain its basic business operations.

D. The United States and Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States, and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

## **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Closing Costs" shall mean expenses reasonably incurred and actually paid by Settling Defendant on or before the date of closing associated with the sale or transfer of the Property, or any part of the Property including, but not limited to, sales commissions, recordation fees and title insurance.

c. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

d. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

e. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

f. "Escrow Account" shall mean the bank account established pursuant to Paragraph 10 of this Consent Decree.

g. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

h. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

i. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants present in the Tailings Impoundments or Depositional Area of the Site as of the effective date of this Consent Decree and as identified in the following documents: (1) MFG, Inc. May 2003. Construction Completion Report, Depositional Area, Talache Mine Tailings Site, Atlanta, Idaho. Prepared for the St. Joe Minerals Corporation and Monarch Greenback, LLC; (2) MFG, Inc. March 2003. Construction Completion Report, Tailings Pile Area, Talache Mine Tailings Site, Atlanta, Idaho. Prepared for the St. Joe Minerals Corporation and Monarch Greenback, LLC; (3) MFG, Inc. (MFG 2001). Final Baseline Human Health Risk Assessment for the Depositional Area (Revised). Prepared for the St. Joe Minerals Corporation, February 2001; (4) MFG, Inc. December 2000. Final Engineering Evaluation/Cost Analysis, Depositional Area, Talache Mine Tailings Site, Atlanta, Idaho. Prepared for the St. Joe Minerals Corporation and Monarch Greenback, LLC; (5) MFG, Inc. Terracon, and Pentec Environmental. March 2000. Final Site Characterization Report, Talache Mine Tailings Site, Atlanta, Idaho. Prepared for St. Joe Minerals Corporation and Monarch Greenback, LLC.

j. "AOC Oversight Costs" shall mean those costs that EPA incurs after the date this Consent Decree is entered by the Court in monitoring and supervising compliance with the two Administrative Orders on Consent (AOCs) referenced in Paragraph 9 of this Consent Decree

to determine whether Settling Defendant is in compliance with those AOCs, including costs incurred in reviewing plans, reports and other documents submitted pursuant to the AOCs, as well as costs incurred in overseeing implementation of the work; however, AOC Oversight Costs do not include, *inter alia*: the costs incurred by the United States to obtain access, to conduct future response actions, or to enforce the terms of the AOCs or this Consent Decree including all costs incurred in connection with dispute resolution under the AOCs and all litigation costs.

k. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

l. "Net Sales Proceeds" shall mean the total value of all consideration received by Settling Defendant for each Transfer less Closing Costs.

m. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

n. "Parties" shall mean the United States and Settling Defendant.

o. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA, United States Forest Service (USFS) or DOJ on behalf of EPA or USFS has paid at or in connection with the Site through the date the Court enters this Consent Decree, plus accrued Interest on all such costs through such date.

p. "Plaintiff" shall mean the United States.

q. "Post Removal Site Control Plan" means the "Talache Mine Tailings Site - Tailings Piles and Depositional Areas Removal Action - Post-Removal Site Control Plan," MFG October 2004, a copy of which is attached to this Consent Decree as Appendix A.

r. "Property" shall mean the property owned by the Settling Defendant and described at Appendix B. The Property includes "Mining Property" and "Non-Mining Property" as set forth in that Appendix.

s. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

t. "Settling Defendant" shall mean Monarch Greenback, LLC.

u. "Site" shall mean the Talache Mine Tailings Superfund Site, and shall include all lands upon which any hazardous substances, pollutants, or contaminants from the Tailings

Impoundments have been released, and all surface water and ground water bodies within which any hazardous substances, pollutants, or contaminants from the Tailings Impoundments have come to be located. The Site is estimated to encompass approximately eighty (80) acres as well as those areas of the Middle Fork of the Boise River and related tributaries where tailings released from the Tailings Impoundments have come to be located. The Site is located near Atlanta, Idaho, and approximately within Township 5 North, Range 11 East of the Boise Meridian. The Site shall also include the areal extent of contamination and all suitable areas in close proximity to the contamination necessary for implementation of the response action. Portions of the Site include lands under the custody, jurisdiction and control of the Forest Service. The Site is identified in the attached map which is Appendix C to this Consent Decree.

v. "Tailings Impoundments" shall mean the upper tailings impoundment and lower tailings impoundment within the Site. The Tailings Impoundments are identified in the attached map, which is Appendix C to this Consent Decree.

w. "Transfer" shall mean each sale, assignment, transfer or exchange by Settling Defendant (or its successors or assigns) of the Property, or any portion thereof.

x. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **V. PAYMENT OF PAST RESPONSE COSTS**

4. Within 60 days of entry of this Consent Decree, Settling Defendants shall pay to EPA \$61,351. At the same time, Settling Defendant shall pay to EPA any amounts due under Paragraph 15(a) of this Consent Decree for calendar years 2004 and 2005, even if such amounts were received by Settling Defendant prior to the date of entry of this Consent Decree.

5. In addition to the payment required by Paragraph 4, Settling Defendant shall make the following payments to EPA:

- (A) Each time Settling Defendant Transfers some or all of Settling Defendant's Mining Property, either as a result of an existing agreement or a future agreement, Settling Defendant shall pay to the United States fifty percent of the Net Sale Proceeds from the Transfer of the Mining Property. Settling Defendant shall make these payments to EPA within 30 days of each Transfer.
- (B) Each time Settling Defendant receives a royalty payment relating to the Settling Defendant's Mining Property, either as a result of payments due pursuant to Section 5.3 (Mining Royalty) of the existing "Mining Lease and Option to Purchase Agreement," dated February 2, 1999, as amended by "Amendment No. 1" on January 5, 2000, and as amended by

"Amendment No.2" on April 30, 2001 (collectively the Atlanta Gold Mining Lease) or royalty payments due pursuant to a future agreement, Settling Defendant shall pay the United States twenty-five percent of the royalty payment received. Settling Defendant shall make these payments within 30 days of receipt of the royalty payment.

The obligations under this paragraph shall end when Settling Defendant has made payments pursuant to this Paragraph totaling \$200,000.

6. Payment under Paragraphs 4 and 5 shall be made by FedWire Electronic Funds Transfer (EFT) to the U.S. Department of Justice account in accordance with EFT instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the District of Idaho following lodging of the Consent Decree.

7. At the time of each payment, Settling Defendants shall also send notice that payment has been made to EPA and DOJ in accordance with Section XVII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill Identification Number 106C, DOJ case number 90-5-1-1-4541/1, and the civil action number.

8. The total amount to be paid pursuant to Paragraphs 4 and 5 shall be deposited in the Talache Mining District Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Talache Mining District, or to be transferred to the EPA Hazardous Substance Superfund.

#### **VI. ESTABLISHMENT OF ESCROW ACCOUNT AND IMPLEMENTATION OF POST REMOVAL SITE CONTROL PLAN**

9. To the extent funds are available in the Escrow Account established under this section, Settling Defendant shall perform activities set forth in the Post Removal Site Control Plan (Appendix A to this Consent Decree) from the effective date of this Consent Decree until December 31, 2013. Settling Defendant shall perform these activities pursuant to and subject to the terms of the following Administrative Orders on Consent:

- (A) In the Matter of: Talache Mine Tailings Superfund Site, Atlanta, Idaho, Administrative Order on Consent for Removal Action, Docket No. CERCLA-10-2000-0151 (June 14, 2000); and
- (B) In the Matter of: Talache Mine Tailings Superfund Site, Atlanta, Idaho, Administrative Order on Consent for Removal Action, Docket No. CERCLA-10-2001-0166 (June 17, 2002).

Compliance with the following obligations under the Administrative Orders on Consent (AOCs) identified in this paragraph shall constitute Settling Defendant's full compliance with those AOCs:

- (a) Performance of the work required by the Post Removal Site Control Plan pursuant to the AOCs;
- (b) Compliance with Sections XVI of the June 14, 2000 AOC;
- (c) Compliance with Sections IX, X, XI, XIII and XXIV of the June 17, 2002 AOC.

10. Settling Defendant shall establish the "Talache Post Removal Site Control Plan Escrow Account" no later than fifteen working days after the effective date of this Consent Decree. The Escrow Account shall be in a federally-insured bank licensed to do business in the State of Idaho. Within thirty days of the effective date of this Consent Decree, Settling Defendant shall provide EPA with a copy of the documentation establishing the Escrow Account and information containing the identity of the bank, account information, and a bank statement showing the initial balance of the Escrow Account. EPA does not, through its approval of the terms of the Escrow Account, guarantee the sufficiency of the Escrow Account established by this Section.

11. Interest received on the Escrow Account, if any, shall be paid into the Escrow Account and may be used first to pay the account fees thereon, if any, and then shall be used in the same manner and for the same purposes as the other funds in the Escrow Account.

12. Settling Defendant shall provide EPA with copies of all statements or other information received from the bank, including information relating to deposits, withdrawals or disbursements, within 10 days of receipt. Upon request by EPA, Settling Defendant shall provide EPA with any other documentation relating to the Escrow Account.

13. By February 1 of each year, Settling Defendant shall submit an annual report to EPA describing money received and disbursed from the Escrow Account in the preceding twelve month period.

14. Settling Defendant agrees that the funds in the Escrow Account shall be used only to implement the Post Removal Site Control Plan at the Site. Except as set forth in Paragraphs 17-19 of this Consent Decree, Settling Defendant shall not permit funds from the Escrow Account to be used for any purpose other than as set forth in the Post Removal Site Control Plan.

15. From January 1, 2004, until December 31, 2013, Settling Defendant shall pay into the Escrow Account the following amounts:

A. Fifty percent of the gross annual payments (which do not include payments identified in Paragraph 5 of this Consent Decree) received pursuant to Section 5.2 (Minimum Payments) of the existing Atlanta Gold Mining Lease or from any successor or additional mining lease relating to the Mining Property. With regard to the payment for calendar year 2004, the amount paid to the Escrow Account shall be fifty percent of the annual payment received minus \$13,216.20; and

B. Twenty-five percent of the Net Sales Proceeds received by Settling Defendant for the Transfer of any Non-Mining Property, or twenty-five percent of the income received by Settling Defendant for the lease of any Non-Mining Property (excluding the first \$2,000 of combined annual income generated by lease of the Non-Mining Property). The initial \$131,252 of Net Sale Proceeds shall be excluded from the effect of this provision for any Non-Mining Property transferred by December 31, 2006.

16. Settling Defendant shall make any payments into the Escrow Account pursuant to Paragraph 15 within 30 days of receipt of any income or proceeds. For income or proceeds received by Settling Defendant prior to the Effective Date of this Consent Decree, Settling Defendant shall make any payments into the Escrow Account within 60 days of the Effective Date.

17. If at any time the balance of the Escrow Account is insufficient to fund the activities required under the Post Removal Site Control Plan, Doe Run has agreed, under a separate Consent Decree in this lawsuit, to perform those activities. If Doe Run is performing those activities, and if directed by EPA, Settling Defendant shall provide Doe Run with all funds available in the Escrow Account.

18. On or before December 31, 2013, EPA shall make a written determination of the net present value of the cost of future activities to be conducted at the Site to implement the Post Removal Site Control Plan. Within 10 days of Settling Defendant's receipt of this written determination, Settling Defendant may invoke dispute resolution pursuant to the Administrative Orders on Consent identified in Paragraph 9 if it disagrees with EPA's determination. At the conclusion of dispute resolution on this issue, within 10 days of EPA's final determination, Settling Defendant may appeal EPA's decision to the District Court. In any such appeal, Settling Defendant shall have the burden of demonstrating that the decision of EPA is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record.

19. Within 30 days of EPA's determination of the net present value of the cost of future activities, or within 30 days of the resolution of any dispute pursuant to the previous Paragraph, Settling Defendant may offer to continue managing the Escrow Account to implement the Post Removal Site Control Plan subject to the provisions of this Consent Decree. If EPA approves Settling Defendant's proposal, the Escrow Account shall not be dissolved, but shall be used to fund the future activities at the Site under the Post Removal Site Control Plan. If EPA does not



approve Settling Defendant's proposal, Settling Defendant shall transfer an amount equal to the net present value of the cost of future activities under the Post Removal Site Control Plan from the Escrow Account to the Talache Mining District Special Account or to the Hazardous Substances Superfund, at EPA's discretion. Whether EPA or Settling Defendant will perform the future activities, any amount in the Escrow Account in excess of EPA's determination of net present value of the cost of future activities under the Post Removal Site Control Plan shall be transferred to Settling Defendant.

## **VII. NOTICE OF TRANSFERS OR LEASES**

20. Settling Defendant agrees to notify EPA of a pending Transfer or lease of all or any part of the Property at least 60 days before the closing date. The notice to EPA shall include:

- i. The purchase or lease price (even if it is zero), other non-cash consideration for the Transfer or lease, a good faith estimate of the value of the non-cash consideration, and a good faith estimate of Closing Costs; and
- ii. If one has been prepared, a written report of an appraisal of the property (or any portion thereof).

21. At any time after receiving Settling Defendant's written notice of a pending Transfer or lease of the Property, the United States may request information from Settling Defendant regarding the Transfer or lease, which information Settling Defendant shall provide within ten days of the request. The United States reserves its right to object to any Transfer or lease, including the right to seek injunctive relief.

22. Settling Defendant agrees to pay all past, current, and future real property taxes on the Property as they accrue until the Property is sold. Settling Defendant further agrees not to mortgage or otherwise encumber the Property beyond existing obligations, except by leasing it under commercially reasonable terms.

23. In the event of a Transfer of all or any part of the Property, the Parties shall continue to be bound by all remaining terms and conditions, and subject to all of the benefits of this Consent Decree.

## **VIII. UNITED STATES FOREST SERVICE PROPERTY**

24. Within 21 days of the lodging of this Consent Decree with the Court, Settling Defendant shall pay to the United States Forest Service \$8649 in two separate checks in the amounts of \$4556.00 and \$4093.00. The United States Forest Service shall then record two deeds, which shall be in the substance and form as the documents attached hereto in Appendix D, and forward the originals to Settling Defendant.

## **IX. FAILURE TO COMPLY WITH CONSENT DECREE**

25. Interest on Late Payments. If Settling Defendant fails to make any payment under Paragraphs 4 or 5 (Payment of Response Costs) or Paragraph 15 by the required due date, Interest shall accrue on the unpaid balance through the date of payment.

26. Stipulated Penalty.

a. If any amounts due to EPA, or due to the Escrow Account, under Paragraphs 4, 5 or 15 are not paid by the required date, Settling Defendant shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 25, \$1000 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number 106C, DOJ Case Number 90-5-1-1-4541/1, and the civil action number. Settling Defendant shall send the check (and any accompanying letter) to:

Mellon Bank  
EPA Region 10 Superfund  
PO Box 3711099M  
Pittsburgh, PA 15251

c. At the time of each payment, Settling Defendant shall also send notice that payment has been made to EPA and DOJ in accordance with Section XVII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number 106C, DOJ Case Number 90-5-1-1-4541/1, and the civil action number.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment or performance is due or the day a violation occurs, and shall continue to accrue through the date of payment or the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

27. If the United States brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

28. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree.

29. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section V or VI or from performance of any other requirements of this Consent Decree.

#### **X. COVENANT NOT TO SUE BY PLAINTIFF**

30. Covenant Not to Sue by United States. Except as specifically provided in Section XI (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), with regard to Past Response Costs, AOC Oversight Costs, or Existing Contamination at the Site. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 4 (Payment of Response Costs). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree and certain obligations under the AOCs specified in Paragraph 9. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

31. Except for the AOCs specifically identified in Paragraph 9, EPA's Administrative Orders on Consent and Unilateral Administrative Orders related to this Site are terminated with respect to Settling Defendant. Additionally, the USFS "Administrative Order on Consent for Removal Action in the matter of Talache Mill Tailings Site," dated October 16, 1997, is terminated with respect to Settling Defendant.

#### **XI. RESERVATIONS OF RIGHTS BY UNITED STATES**

32. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiff in Paragraph 14. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendant with respect to:

a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;

b. liability for costs incurred or to be incurred by the United States other than Past Response Costs, AOC Oversight Costs, or costs arising from Existing Contamination;

c. liability resulting from conduct by the Settling Defendant, its successors, or assignees that exacerbates Existing Contamination;

d. liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants at or from the Site after the effective date of this Consent Decree, not within the definition of Existing Contamination;

e. liability arising from the past, present, or future disposal, release, or threat of release of hazardous substances outside of the Site;

f. criminal liability; and

g. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

33. Notwithstanding any other provision of this Consent Decree, EPA reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the financial information provided by Settling Defendant, or the financial certification made by Settling Defendant in Paragraph 49, is false or, in any material respect, inaccurate.

## **XII. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

34. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs, AOC Oversight Costs or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Idaho, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

35. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

36. Settling Defendant agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Settling Defendant with respect to the Site is based solely on

having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

37. The waiver in Paragraph 36 shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against Settling Defendant. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

### **XIII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

38. Except as provided in Paragraph 36 (Non-Exempt De Micromis Waiver), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 36 (Non-Exempt De Micromis Waiver), the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

39. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, effective as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs, AOC Oversight Costs, and Existing Contamination at the Site.

40. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no

later than 60 days prior to the initiation of such suit or claim. Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

41. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section X.

#### **XIV. SITE ACCESS**

42. Settling Defendant shall, commencing on the date of lodging of this Consent Decree, provide the United States and its representatives, including EPA and contractors, with access at all times to the Site, or to such other property as required by the AOCs identified in Paragraph 9 and after any Transfer of Property, in the manner and to the extent previously agreed upon in the Environmental Protection Easement and Declaration of Restrictive Covenants attached to this Consent Decree as Appendix E for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;
2. Verifying any data or information submitted to the United States;
3. Conducting investigations relating to contamination at or near the Site;
4. Obtaining samples;
5. Assessing the need for, planning, or implementing response actions at or near the Site;
6. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or their agents, consistent with Section XV (Access to Information); and
7. Assessing Settling Defendant's compliance with this Agreement.

43. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

#### **XV. ACCESS TO INFORMATION**

44. Settling Defendant shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

#### **45. Confidential Business Information and Privileged Documents.**

a. Settling Defendant may assert business confidentiality claims covering part or all of the records submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Defendant that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such records without further notice to Settling Defendant.

b. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant assert such a privilege in lieu of providing records, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

46. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

## **XVI. RETENTION OF RECORDS**

47. Until 10 years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

48. After the conclusion of the 10-year document retention period in the preceding paragraph, Settling Defendant shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendant shall deliver any such records to EPA. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, it shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

49. Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has:

(a) not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6972; and

(b) submitted to the United States financial information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the financial information was submitted to EPA and the time Settling Defendant executes this Consent Decree.

## **XVII. NOTICES AND SUBMISSIONS**

50. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to



the other Defendants in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and Settling Defendant, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ # 90-5-1-1-4541/1)  
P.O. Box 7611  
Washington, D.C. 20044-7611

As to EPA:

Director, Environmental Cleanup Office  
United States Environmental Protection Agency  
Region 10  
ECL - 113  
1200 Sixth Avenue  
Seattle, Washington 98101

Dave Tomten  
On-Scene Coordinator  
U.S. EPA Idaho Operations Office  
1435 N. Orchard  
Boise, Idaho 83706

Diane Norton  
Office of Management Programs  
United States Environmental Protection Agency  
Region 10  
OMP-146  
1200 Sixth Avenue  
Seattle, Washington 98101

As to Settling Defendants:

Gary D. Babbitt, esq.  
Hawley Troxell Ennis and Hawley  
877 Main Street, Suite 1000  
Boise, ID 83701

A.H. Burroughs, III  
Monarch Greenback, LLC  
1617 Claremont Drive  
Boise, ID 83702

**XVIII. RETENTION OF JURISDICTION**

51. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

**XIX. INTEGRATION/APPENDICES**

52. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

**Appendix A is the Post Removal Site Control Plan (on CD-ROM;**

**Appendix B-1 is a description of the Mining Property;**

**Appendix B-2 is a description of the Non-Mining Property;**

**Appendix C is a map of the Site showing the Tailings Impoundments and the Depositional Area;**

**Appendix D contains the draft Deeds relating to the USFS property to be transferred to Monarch;**

**Appendices E-1 and E-2 are the Environmental Protection Easement and Declaration of Restrictive Covenants for the Site.**

## **XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

53. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

54. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

## **XXI. SIGNATORIES/SERVICE**

55. The undersigned representative of the Settling Defendant to this Consent Decree and the Deputy Section Chief of the Environmental Enforcement Section of the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

56. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

57. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

## **XXII. FINAL JUDGMENT**

58. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and the Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

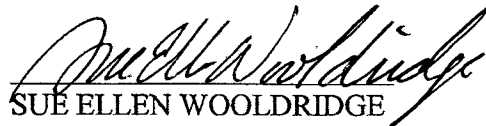
SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Monarch Greenback, et al., CV 02-436-S-EJL, relating to the Talache Mine Tailings Superfund Site.

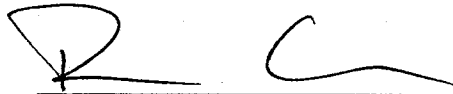
FOR THE UNITED STATES OF AMERICA

Date: 3.10.06



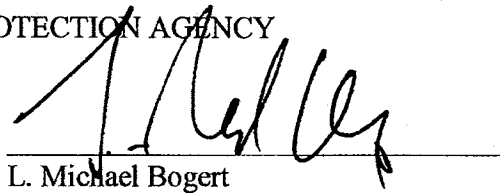
SUE ELLEN WOOLDRIDGE  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date: 2/9/2006



Paul Gormley  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

FOR THE ENVIRONMENTAL PROTECTION AGENCY




L. Michael Bogert  
Regional Administrator  
Region 10  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, WA 98101



Ted Yackulic  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, WA 98101

FOR THE UNITED STATES FOREST SERVICE



---

Jack Troyer, Regional Forester  
U.S. Department of Agriculture - Forest Service  
Region IV  
Federal Building  
324 25<sup>th</sup> Street  
Ogden, UT 84401

FOR DEFENDANT MONARCH GREENBACK, LLC.

Date:

9/24/05



A.H. Burroughs, III  
Representative of Member Manager Representative  
Monarch Greenback, LLC  
1617 Claremont Drive  
Boise, ID 83702

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Gary D. Babbitt, esq.  
Hawley Troxell Ennis and Hawley  
877 Main Street, Suite 1000  
Boise, ID 83701